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No. 91-502

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORTY-SIX STATES IN SUPPORT OF PETITIONERS

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Deputy Attorney General

ED SALAZAR
Assistant Attorney General
Division Chief, Energy

*DOUGLAS BURT FRASER
Assistant Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
512/463-2003

*Counsel of Record
On behalf of the
State of Texas and the
Railroad Commission
of Texas
Counsel for *Amici Curiae*

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(List of Counsel for *Amici* continued inside front cover)

State of Alabama
JIMMY EVANS
Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

State of Alaska
CHARLES E. COLE
Attorney General
P.O. Box K-State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

State of Arizona
GRANT WOODS
Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-5025

State of Arkansas
WINSTON BRYANT
Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas
(501) 682-2007

State of California
DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
Public Rights Division
ALBERT NORMAN SHELDEN
Deputy Attorney General
110 West A Street
Suite 700
San Diego, California 92101
(619) 237-7754

State of Colorado
GATE A. NORTON
Attorney General
110 16th Street, 10th Floor
Denver, Colorado 80202
(303) 620-4500

State of Connecticut
RICHARD BLUMENTHAL
Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06101
(203) 566-2028

State of Florida
ROBERT A. BUTTERWORTH
Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
(409) 487-1963

State of Georgia
MICHAEL J. BOWERS
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3300

State of Hawaii
WARREN PRICE, III
Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

State of Idaho
LARRY ECHOHAWK
Attorney General
Boise, Idaho 83720-1000
(208) 334-2400

State of Illinois
ROLAND W. BURRIS
Attorney General
SOIC-12th Floor
100 West Randolph St.
Chicago, Illinois 60601
(312) 814-3000

State of Indiana
LINLEY E. PEARSON
Attorney General
Room 219 State House
Indianapolis, Indiana 46204
(317) 232-6330/6331

State of Iowa
BONNIE J. CAMPBELL
Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

State of Kansas
ROBERT T. STEPHAN
Attorney General
Kansas Judicial Center, 2d FL
Topeka, Kansas 66612
(913) 296-2215

Commonwealth of Kentucky
FEDERIC J. COWAN
Attorney General
Frankfort, Kentucky 40601
(502) 564-7600

State of Louisiana
WILLIAM J. GUSTE, JR.
Attorney General
234 Loyola Avenue
7th Floor
New Orleans, Louisiana 70112
(504) 568-5575

State of Maine
MICHAEL E. CARPENTER
Attorney General
STEPHEN L. WESSLER
Deputy Attorney General
State House Station 6
Augusta, Maine 04333
(207) 626-8800

State of Maryland
J. JOSEPH CURRAN, JR.
Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(901) 576-6330

State of Michigan
FRANK J. KELLEY
Attorney General
525 West Ottawa Street
P.O.Box 30212
Lansing, Michigan 48909
(517) 373-1124

State of Minnesota
HUBERT H. HUMPHREY, III
Attorney General
525 Park Street
Suite 200
St. Paul, Minnesota 55103
(612) 297-1050

State of Mississippi
MIKE MOORE
Attorney General
Carroll Gartin Justice Building
Post Office Box 220
Jackson, Mississippi 39205-0220
(601) 359-3680

State of Missouri
WILLIAM L. WEBSTER
Attorney General
P.O. Box 899
Jefferson City, Missouri 65201
(314) 751-3321

State of Montana
MARC RACICOT
Attorney General
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

State of Nebraska
DON STENBERG
Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

State of Nevada
FRANKIE SUE DEL PAPA
Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

State of New Hampshire
JOHN P. ARNOLD
Attorney General
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3655

State of New Jersey
ROBERT J. DEL TUFO
Attorney General
Richard J. Hughes Justice Complex
CN 080 Trenton, New Jersey 08625
(609) 984-9664

State of New Mexico
TOM UDALL
Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87505
(505) 827-6000

State of New York
ROBERT ABRAMS
Attorney General
RONNA D. BROWN
ANDREA C. LEVINE
Assistant Attorneys General
Bureau of Consumer Frauds and Protection
120 Broadway, 3rd Floor
New York, NY 10271
(212) 341-2294

State of North Dakota
NICHOLAS J. SPAETH
Attorney General
600 East Boulevard Ave., 1st Floor
Bismarck, North Dakota 58505
(701) 224-2210

State of North Carolina
LACY E. THORNBURG
Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629
(919) 733-7214

State of Ohio
LEE FISHER
Attorney General
180 East Broad Street
Columbus, Ohio 43266-0573
(614) 466-4397

State of Oklahoma
SUSAN B. LOVING
Attorney General
Room 112, State Capitol Building
2300 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 521-3921

State of Oregon
DAVE FROHNMAYER
Attorney General
Justice Building
Salem, Oregon 97310
(503) 378-6002

Commonwealth of Pennsylvania
ERNEST D. PREATE, JR.
Attorney General
Strawberry Square - 16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

State of Rhode Island
JAMES E. O'NEIL
Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

State of South Carolina
T. TRAVIS MEDLOCK
Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

State of South Dakota
MARK W. BARNETT
Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3215

State of Texas
DAN MORALES
Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2100

State of Utah
PAUL VAN DAM
Attorney General
JAN GRAHAM
Solicitor General
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1874

State of Vermont
JEFFREY L. AMESTOY
Attorney General
Pavilion Office Building
Montpelier, Vermont 05602
(802) 828-3171

Commonwealth of Virginia
MARY SUE TERRY
Attorney General
101 N. 8th Street
Richmond, Virginia 23219
(804) 786-7584

State of West Virginia
MARIO J. PALUMBO
Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 348-2021

State of Washington
KENNETH O. EIKENBERRY
Attorney General
7th Floor Highways-Licenses Bldg.
PB-71
Olympia, Washington 98504-8071
(206) 753-6245

State of Wyoming
JOSEPH B. MEYER
Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

QUESTION PRESENTED

Whether the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), which prohibits state regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation," preempts the State of California from engaging in the economic regulation of Federal Express Corporation's purely intrastate transportation of packages that are transported exclusively by truck and at no time by air.

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BRIEF *AMICUS CURIAE* OF FORTY-SIX STATES IN SUPPORT OF PETITIONERS

Amici curiae, forty-six of the fifty States of the Union, hereby submit their brief *amicus curiae* urging the Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and to set the cause for briefing and oral argument.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are forty-six States, as represented by their respective Attorneys General. *Amici* have a vital interest in legal issues that affect the powers and responsibilities of state governments.

This case presents the question of whether the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), preempts a state from regulating the purely intrastate activities of motor carriers on its public streets and highways where the motor carrier involved happens to hold a certificate as an "air carrier" under the Federal Aviation Act, 49 U.S.C. App. § 1371.

Constitutional and statutory issues affecting the power of state governments to regulate in the public interest are of great importance to *amici*. The question in this case is particularly important because the decision below seriously impairs the ability of the states to protect consumers and to assure the safety of their citizens on the public highways. If the State of California is preempted from regulating the purely intrastate trucking activities of a company simply because that company holds an air carrier certificate, then it is difficult to imagine what state regulation of such a company is not preempted. *Amici* consider it of utmost importance that the Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and set the cause for briefing and argument.[1]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is extremely disruptive of state motor carrier regulatory programs across the country and threatens to erode the power of the states to protect the public safety of their citizens on the highways. State regulation of the purely intrastate, purely ground motor carrier operations of an "air carrier" such as Federal Express Corporation is not regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air

[1] The States of Georgia and Maine do not join in Part V of this brief.

transportation." Such regulation has little or nothing to do with an air carrier's provision of air transportation. The Ninth Circuit's decision is no less than judicial legislation, unsupported by the words or legislative history of the statute. The issue presented has arisen in other jurisdictions and is one of national importance. Indeed, the Ninth Circuit's decision appears to create an irreconcileable conflict between decisions of the Ninth Circuit and the State of Tennessee. The Court should grant certiorari with full briefing and oral argument both in the instant case and in pending cases involving the authority of states to enforce state deceptive advertising laws against air carriers.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION IS EXTREMELY DISRUPTIVE OF STATE MOTOR CARRIER REGULATORY PROGRAMS ACROSS THE COUNTRY

The Ninth Circuit's decision in *Federal Express Corp. v. Pub. Util. Comm'n of California,* 936 F.2d 1075 (9th Cir. 1991), Al,[2] will cause serious disruption in the intrastate motor carrier regulatory programs of the fifty states.

Clearly, significant differences exist in the economic regulatory programs of the fifty states. Many, such as California, utilize deregulatory approaches which seek to harness the benefits of competitive market forces, subject to appropriate safeguards designed to protect consumers from anticompetitive and discriminatory practices. E10. Others are closer to

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[2] As herein used, page references beginning with letters refer to pagination in the appendix to the petition for certiorari.

traditional cost-of-service regulation. Each is a regulatory program which, in the view of the state adopting that program, serves the public interest.[3] The variability among state regulatory programs highlights the differences among states and the difficulty in formulating a single regulatory system for intrastate motor carriage. This case, however, raises the question of the *authority* of a state to adopt and enforce a program consistent with its view of the public interest.

The lower court reaches its conclusion despite express Congressional authorization of state regulation of intrastate motor carriers. 49 U.S.C. § 10521(b). Thus, the Ninth Circuit unnecessarily creates a conflict between the Airline Deregulation Act and the Interstate Commerce Act, impliedly repealing provisions of the latter.

In addition, the Ninth Circuit's decision invalidates by implication some, but apparently not all, of the provisions of regulatory programs in each of the fifty states. It suggests, without any basis in the words of the statute, that economic regulatory programs are preempted while non-economic programs are not. A5. Nevertheless, the Ninth Circuit defines economic regulation as anything that "affect[s] the price" of the service offered. A6. In this way, considerable uncertainty is created as to which provisions in a particular state's regulatory scheme remain intact. The authority of states to regulate purely intrastate activities on their public highways should not rest on such an infirm foundation.

The Ninth Circuit's rationale raises more questions than it answers. Under that reasoning, may

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[3] A handful of states have deregulated the economic activites of motor carriers entirely but continue to regulate motor carrier safety.

a state prohibit rate discrimination by highway carriers engaging in purely intrastate trucking operations, when such carriers hold air carrier certificates? May it require such carriers to file tariffs available for public inspection or to set rates within a zone of reasonableness established by the state? May it prohibit predatory pricing by such motor carriers? May it specify minimum insurance requirements for such highway carriers? May it specify worker's compensation requirements for such carriers? May it require the drivers of such motor carriers to adhere to driving requirements designed to meet problems recognized to exist in the industry? May it specify safety inspection requirements and procedures if those regulations affect the price of the motor carrier's truck-only services? May it require an intrastate motor carrier that also happens to hold an air carrier certificate to obtain operating authority from the state before conducting its intrastate trucking business? May it revoke operating authority for non-compliance with state laws and regulations? And may a state charge fees to underwrite the cost of its regulatory program? The Ninth Circuit's decision expressly provides that a state may not impose fees on such carriers, A6, and strongly implies that a state may do none of the other things. Such an intrusion into state regulation of the intrastate activities of trucking companies cannot be what Congress intended when it attempted to deregulate the provision of air transportation by air carriers in the Airline Deregulation Act of 1978.

Unless corrected by this Court on certiorari, the Ninth Circuit's decision will spawn an epidemic of unnecessary litigation across the country.

II

THE NINTH CIRCUIT'S DECISION THREATENS THE ABILITY OF THE STATES TO PROTECT PUBLIC SAFETY

Despite the Ninth Circuit's assertion that "it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express," A5, that Court's rationale raises numerous questions as to whether the Airline Deregulation Act preempts state safety regulation of motor carriers who also are air carriers. Economic regulation and safety regulation in most states are closely intertwined. *See* E66, E75-77. State economic regulatory commissions commonly assume an important role in setting truck safety standards as well as an important supporting role to state highway patrols in safety enforcement. Indeed, in most states, the state commission's revocation or withdrawal of a highway carrier's operating authority is the ultimate sanction for unsafe carriers. C7-9, D7, E76-7. Nevertheless, the Ninth Circuit's decision raises considerable doubt as to whether a state regulatory commission may (1) grant operating authority to a motor carrier that is also an air carrier, (2) specify carrier and driver safety requirements that affect the carrier's costs, (3) revoke such a carrier's operating authority for non-compliance with safety requirements, and (4) impose fees to underwrite its safety program. *See generally* the District Court's opinion, *Federal Express Corp. v. Pub. Util. Comm'n of California,* 723 F.Supp. 1379 (N.D.Cal. 1989); C7-9. The uncertainty created by the Ninth Circuit's rationale is compounded by its definition of "economic" regulation -- i.e., it concludes that Federal Express is immune from any state regulation that "affects the price" of its service. A6. Under this definition, virtually any state regulation

of the activities of an air carrier constitutes economic regulation subject to federal preemption. In light of the Ninth Circuit's reasoning, the Court should grant certiorari to clarify that § 1305(a)(1) in no way impinges on the authority of the states to regulate trucking safety.

The Ninth Circuit's ruling makes it more difficult for the states to ensure public safety on their highways at a time when the need for strictly-enforced state trucking safety programs is at its greatest. In an economically deregulated environment, motor carriers are subject to strong incentives to cut costs. States need to scrutinize carrier practices and enforce state-imposed safety requirements even more closely. Indeed, the Congressional Office of Technology Assessment has concluded that one of two top priorities was "improving State enforcement capabilities and regulatory uniformity." U.S. Congress, Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment,* OTA-SET-382 (Washington, D.C: U.S. Gov't Print'g Ofc., Sept., 1988), at p. 20. The OTA study also concluded that "State audit programs are indispensable additions to Federal enforcement efforts." *Id.*

The Court should grant certiorari to prevent an undue erosion of the states' ability to protect the safety of their citizens on the highways.

III

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT A STATE'S REGULATION OF AN INTRASTATE MOTOR CARRIER THAT HOLDS AN AIR CARRIER CERTIFICATE DOES NOT CONSTITUTE REGULATION "RELATING TO RATES, ROUTES, AND SERVICES OF ANY AIR CARRIER"

The question presented in this case is whether California's regulation of Federal Express Corporation's purely intrastate trucking activities -- its intrastate transportation by truck of packages that never see the interior of an airplane -- constitutes regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation." 49 U.S.C. App. § 1305(a)(1).

Federal Express argued below that this case should be resolved by equating the statutory words "relating to" with the Court's broad construction of the words "relate to" in Section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). *See Federal Express Corp. v. Pub. Util. Comm'n of California,* 716 F.Supp. 1299, 1303 (N.D.Cal. 1989). However, this Court has made it clear that the meaning of those words as employed in ERISA cannot casually be translated to other contexts.

In *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 47 (1987), *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 739 (1985), and *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-100 (1983), this Court did conclude that the words "relate to" in ERISA had an "expansive sweep." *Dedeaux, supra,* 481 U.S. at 47. However, it rested its determination that the words should be interpreted "in their broad sense," [*Shaw,*

supra, 463 U.S. at 98], on 1) the plain language of § 514(a), 2) the structure of ERISA, and 3) ERISA's legislative history. *Id.* at 100. Under the Court's analysis, it is clear that the meaning of the words "relate to" in ERISA is *sui generis. See FMC Corp v. Holliday,* 111 S.Ct. 403 (1990). As noted by the District Court herein,

> [T]his reading of ERISA preemption should not be taken as a canon of general statutory interpretation. The legislative history of ERISA indicates that Congress specifically intended a broad reading of preemption in that context. *Pilot Life,* 481 U.S. at 45-46, 107 S.Ct. at 1551-1552 (citations omitted). Plaintiff cites no comparable legislative history concerning section 1305(a). It is true, however, that the legislative framework of section 1305(a), the Airline Deregulation Act of 1978, was aimed at creating "comprehensive legislation" to supply "a gradual and phased transition to a deregulated system." *Hughes Air Corp. v. Public Utilities Comm'n,* 644 F.2d 1334, 1337 (9th Cir. 1981) (citation omitted).
>
> Even assuming arguendo that the phrase "relating to" should be read expansively, plaintiff's position is problematic. The court has found no cases in which the phrase "relating to" in this section has been applied to regularly conducted ground transportation. *Compare, e.g., Anderson v. USAir, Inc.*. 818 F.2d 49, 57 (D.C. Cir. 1987) (state law requirement of courteous service on airplane preempted by section 1305(a)). Under the interpreta-

> tion urged by Federal Express, virtually any air carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities. The court declines to strain such a reading from section 1305(a).

716 F.Supp. at 1303; B6-7 (footnotes omitted).

The District Court's balanced and thoughtful analysis is correct. The conclusion that state regulation of intrastate motor carrier operations having nothing to do with the provision of air transportation is regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation" stretches the statute well beyond the clear and manifest intent of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). If the Ninth Circuit's reading of the statute were correct, the states would be preempted from regulating "rates, routes, and services" having nothing to do with the provision of air transportation. Thus, the statutory reference to air carriers "having authority . . . to provide air transportation" would be surplusage. Such a reading of the statute is inappropriate. *Colautti v. Franklin,* 439 U.S. 379, 392 (1979); *United States v. Menasche,* 348 U.S. 528, 538-39 (1955).

As above noted, the statutory reference to the "rates, routes, and services of any air carrier having authority . . . to provide air transportation" is most plausibly read to refer to the carrier's "rates, routes, and services" in providing air transportation, i.e., to its "rates, routes, and services" as an air carrier. A contrary reading of the statute infers a Congressional intent to immunize from state regulation all activities of air carriers, whether they involve the provision of ground transportation, banking or insurance services, or anything else. This was not the purpose of the

Airline Deregulation Act. *Hughes Air Corp. v. Pub. Util. Comm'n of California,* 644 F.2d 1334, 1336-7 (9th Cir. 1981).

In this case, Federal Express has failed to meet its heavy burden of demonstrating that preemption of the state's exercise of its traditional police powers over purely intrastate, truck-only motor carrier operations was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230. The Ninth Circuit's conclusion that "Congress has freed [Federal Express] from the constrictive grasp of economic regulation by the states [with respect to its activities having nothing to do with the provision of air transportation]" is no less than judicial legislation. *See, e.g.,* 49 U.S.C. § 10521(b). If that were the result Congress intended, Congress could have said so in clear and unmistakeable language. Congress did not do so.

The Court should grant certiorari to clarify that a company's status as an "air carrier" does not give it license to violate, with impunity, state regulations having no more than a miniscule relationship to the provision of air transportation.

IV

THE NINTH CIRCUIT'S DECISION CREATES AN IRRECONCILEABLE CONFLICT BETWEEN THE NINTH CIRCUIT AND THE STATE OF TENNESSEE AND INVOLVES AN ISSUE OF NATIONAL IMPORTANCE

California's dispute with Federal Express raises an issue of national importance -- an issue which has arisen not only in California but across the country. For example, in *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n,* 925 F.2d 962 (6th Cir. 1991), *cert.*

denied, ___ U.S. ___ (No. 90-1766 Oct. 7, 1991), the United States Court of Appeals for the Sixth Circuit affirmed a dismissal on *Younger [v. Harris,* 401 U.S. 37 (1971)] abstention grounds of a complaint in which Federal Express had raised the same claims against the Tennessee Public Service Commission that it raised herein against the California Public Utilities Commission. The Court's denial of certiorari in *Tennessee Pub. Serv. Comm'n* leaves intact a final, nonappealable order of the Tennessee Public Service Commission that Federal Express is subject to Tennessee's state regulation. *See* 925 F.2d at 964, 965, 966 n. 2, 969.

Thus, an irreconcileable conflict is created between the Ninth Circuit's decision below and the now-final order of the Tennessee Public Service Commission. A denial of certiorari in the instant case would mean that under final United States Court of Appeals and Tennessee Public Service Commission decisions having *res judicata* and *collateral estoppel effect,* Federal Express will be subject to state regulation in Tennessee but immune from state regulation in each of the states of the Ninth Circuit. Such a result appears contrary to the Court's stated standards governing review on writ of certiorari.

In addition, the Motor Carrier Authority, Indiana Department of Revenue, issued an order to show cause on August 22, 1991, in Docket No. 00059, *In the Matter of Federal Express Corporation, A Formerly Exempt Common Carrier of Property, Intrastate,* requiring Federal Express to show cause why it should not be subject to regulation by the State of Indiana with respect to its intrastate motor carrier operations.

The Ninth Circuit's decision creates an irreconcileable conflict between that court and the

State of Tennessee, and the issue will continue to engender controversies across the nation until it is resolved by this Court.[4]

V

THE COURT SHOULD GRANT CERTIORARI BOTH IN THE TWA CASES AND IN THE INSTANT CASE

On June 10, 1991, the Court invited the Solicitor General of the United States to express the views of the United States in *Morales v. Trans World Airlines, Inc.*, No. 90-1604, and *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606 ("the *TWA* cases"). Those petitions raise inter alia the question of whether the Airline Deregulation Act of 1978 preempts the states from enforcing state deceptive advertising laws with respect to an air carrier's false advertising of air fares.

The preemption issue presented in the *TWA* cases and the preemption issue presented herein are distinct. The former petitions address the important issue of whether Congress, in enacting the Airline Deregulation Act, intended to single out the airline industry as opposed to all other industries for immunity from state enforcement of deceptive advertising laws. The latter petition addresses the important issue of whether Congress intended to render all activities of air carriers immune from state regulation, whether or not those activities are related to the provision of air transportation.

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[4] A denial of certiorari will render the Ninth Circuit's decision final as to the most populous state in the country, in which it is estimated that Federal Express transports, purely intrastate and exclusively by truck, more than a million packages per year.

Both issues are of great importance. The former petitions seek to ensure that states will continue to be able to protect the public from deceptive advertising practices by airlines. The latter petition seeks to ensure that motor carriers that also happen to be air carriers will continue to be bound, in their purely intrastate, truck-only motor carrier operations, by state regulatory requirements designed to assure fair competition, the prohibition of discriminatory practices, public safety on the highways of a state and the satisfaction of other public interest concerns. Surely Congress, in deregulating the "rates, routes, and services of any air carrier having authority . . . to provide air transportation," did not intend to immunize air carriers from their obligations to advertise truthfully or from their obligations to comply with state regulation of their activities having virtually nothing to do with the provision of air transportation. Each of these issues is worthy of the Court's plenary consideration in its own right.

The Court should grant certiorari with full briefing and oral argument both in the *TWA* cases and in the instant case.

CONCLUSION

Amici respectfully urge that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and set the cause for briefing and oral argument.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Deputy Attorney General

ED SALAZAR
Assistant Attorney General
Division Chief, Energy

*DOUGLAS BURT FRASER
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
512/463-2003

*Counsel of Record
On behalf of the
State of Texas and the
Railroad Commission of Texas
Counsel for *Amici Curiae*

November 22, 1991